KASTURI NAMBIAR KRISHNAN v. STEVEN SEBASTIAN; SIVASANKAR MOHANADASS (PARTY CITED)

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[DIVORCE PETITION NO: WA-33-258-05-2022]
17 MAY 2023

Abstract – *Although a litigant is entitled to select the advocate and solicitor whom he desires to appear for him, the courts are bound to see that the due administration of justice is not in any way embarrassed. When there is a conflict of interest where a solicitor is a potential witness in a court proceeding, the solicitor would be treading very precariously in insisting on representing its client as it would stand to run foul of several provisions of the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession Act 1976*

LEGAL PROFESSION: *Solicitors – Recusal – Application for solicitors to recuse themselves from representing litigant – Conflict of interest – Whether arose – Whether solicitor potential witness in proceedings – Whether there was breach of provisions of Legal Profession (Practice and Etiquette) Rules 1978 and Legal Profession Act 1976*

This was an application ('application') by the petitioner wife ('petitioner') for an order that the respondent husband's ('respondent') solicitors, Messrs GK Sritharan, recuse themselves from representing the respondent in a divorce proceeding. The petitioner and respondent ('parties') were married on 1 June 2008 and had two children who were in the custody, care and control of the petitioner. The marriage deteriorated with time, and the petitioner claimed that it was due to the respondent's intolerable behaviour, which was his involvement in drugs. As a result of such activities, the petitioner claimed that the respondent was wanted by the police. The petitioner further claimed that in February 2021, she was arrested by the police on their belief that the petitioner had knowledge of the whereabouts of the respondent. The petitioner had to spend a night in the lockup, before being brought to the Magistrate's Court the following day for a hearing on an application to remand the petitioner ('remand application'), where she was represented by Messrs GK Sritharan. The Magistrate dismissed the remand application, which led to the petitioner's release from police custody. The petitioner subsequently filed a divorce petition. The respondent responded to the divorce petition and engaged Messrs GK Sritharan to act for him. The petitioner thus filed this application. The issues that arose were (i) whether there was a conflict of interest for Messrs GK Sritharan to represent the

A respondent; (ii) whether Mr GK Sritharan ('GK Sritharan'') was a potential witness in the divorce proceedings; and (iii) whether Messrs GK Sritharan had breached the provisions of the Legal Profession (Practice and Etiquette) Rules 1978 ('Rules')

Held (allowing application with costs):

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(1) Messrs GK Sritharan had been involved with the petitioner in the police matter involving the respondent, a matter which was at the heart of the divorce petition. The petitioner had given all relevant confidential information to Messrs GK Sritharan regarding her arrest, and remand application, which was connected to the respondent's drug dealing. Messrs GK Sritharan had also advised the petitioner on the strategy, and what was needed to be done, when she was arrested by the police. In the divorce petition, the petitioner had pleaded these circumstances as the basis for the irretrievable breakdown of the marriage, pursuant to s. 54(1)(b) of the Law Reform (Marriage & Divorce) Act 1976. The conditions for the application of r. 3 of the Rules had been fulfilled, in that, the petitioner had established that there was a relationship of solicitor-client. The information that was acquired by GK Sritharan, was now imputed to Messrs GK Sritharan, whether as a sole proprietorship or partnership, and the petitioner was relying on such information in the divorce petition against the respondent, whom Messrs GK Sritharan was now representing. Messrs SK Sritharan did represent the petitioner in the remand application which had now become the basis of the marital dispute in the divorce petition. (paras 12-19)

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(2) Although a litigant is entitled to select the advocate and solicitor whom he desires to appear for him, this court was bound to see that the due administration of justice is not in any way embarrassed. Hence, at this stage, this court had to consider whether a reasonable man armed with all the facts, might reasonably anticipate the probability of GK Sritharan himself being called as a witness at the hearing of the divorce petition. At this stage, GK Sritharan's objection to being called as a witness was irrelevant. The fact of the matter was that he was a potential witness in the divorce proceedings, and as such, he should not be representing the respondent in the same. In breaching rr. 3 and 28(1) of the Rules, Messrs GK Sritharan must also be reminded of rr. 4 and 5 of the Rules. (paras 22, 25 & 26)

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(3) Advocates and solicitors should have due regard to their client's interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute. Messrs GK Sritharan was treading very precariously in insisting on representing the respondent in the divorce petition, as they stood to run foul of several provisions of the Rules as well as the Legal Profession Act 1976. (paras 29 & 30)

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Case(s) referred to:

Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 1 LNS 67 HC ***(refd)***

Emperor v. Dadu Ramu, AIR 1939 Bom 150 ***(refd)***

Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors [2009] 4 CLJ 303 CA ***(refd)***

Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd [2010] 2 CLJ 1061 HC ***(refd)***

Perbadanan Pengurusan 3 TWO Square v. 3 TWO Square Sdn Bhd [2017] 1 LNS 844 HC ***(refd)***

Quah Poh Keat & Ors v. Ranjit Singh Taram Singh [2009] 4 CLJ 316 CA ***(refd)***

Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 CLJ 754 HC ***(refd)***

Teoh Soo Beng v. Golden Castle City Sdn Bhd & Ors [2018] 2 CLJ 631 HC ***(refd)***

Wee Choo Keong v. PP [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 HC ***(refd)***

Legislation referred to:

Law Reform (Marriage & Divorce) Act 1976, s. 54(1)(b)
Legal Profession Act 1976, s. 94(3)
Legal Profession (Practice & Etiquette) Rules 1978, rr. 3, 4, 5, 28(a)

For the petitioner - Yogarani Maniam; M/s Yoga & Partners
For the respondent - GK Sritharan; M/s GK Sritharan & Co
For the party cited - Gengeys Vijay; M/s Gengeys & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was an application ("this application") in encl. 22 by the petitioner wife for an order that the respondent's solicitors, Messrs GK Sritharan, recuse themselves from representing the respondent in the divorce proceedings.

The Factual Background

[2] The petitioner and respondent (collectively, "the parties"), were married on 1 June 2008, and resided at their matrimonial home in Masai, Johor. There are two children of the marriage who are currently in the custody, care and control of the petitioner.

[3] The marriage deteriorated with time, and the petitioner claimed that it was due to the respondent's intolerable behaviour, which was his involvement in drugs. As a result of such activities, the petitioner claimed that the respondent was wanted by the police, and had even gone into hiding to evade arrest.

[4] The petitioner further claimed that in February 2021, she was arrested by the police on their belief that the petitioner had knowledge of the whereabouts of the respondent. The petitioner had to spend a night in the lockup, before being brought to the Magistrate's Court the following day for a hearing on an application to remand the petitioner ("the remand application"), where she was represented by Messrs GK Sritharan.

[5] After hearing the submissions by Mr GK Sritharan from Messrs GK Sritharan, the learned Magistrate dismissed the remand application, which led to the petitioner's release from police custody.

[6] The petitioner subsequently left the matrimonial home and moved to Kuala Lumpur with her children in February 2021. In May 2022, the petitioner filed a divorce petition ("the divorce petition"). The respondent who had responded to the divorce petition in June 2022 was, at that time, represented by the Law Chambers of Sailaja. On 9 September 2022, the respondent changed solicitors and engaged Messrs GK Sritharan instead to act for him in the divorce petition.

[7] Incidentally, on 1 September 2022, Messrs GK Sritharan had issued a reminder to the petitioner for an invoice in the amount of RM16,000, on the premise that such was the balance sum owing by the petitioner to Messrs GK Sritharan for fees incurred in representing the petitioner in the remand application. In fact, in that letter, Messrs GK Sritharan had threatened legal action against the petitioner to recover such fees.

[8] The petitioner had apparently paid an amount of RM4,000 and had refused to pay the balance sum of RM16,000 as she had disputed the amount, and averred that she was in the midst of lodging a complaint to the Advocates & Solicitors' Disciplinary Board against Messrs GK Sritharan.

[9] On 27 October 2022, the petitioner filed this application, which was allowed for the following reasons.

Contentions, Evaluation And Findings

[10] At the outset, it must be stated that the right of an advocate and solicitor to appear in court is not absolute. The conduct of an advocate and solicitor in legal proceedings, which may affect the administration of justice, is subject to the court's supervisonary jurisdiction. The court has the right and duty to supervise the conduct of an advocate and solicitor, and the court would be neglecting its duty if it failed to exercise its supervisory power. Similarly, an advocate and solicitor owe a duty to the court to conduct litigation with due propriety and to assist in promoting the cause of justice. The court has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process, and as part of that jurisdiction, to prevent an advocate and solicitor, or any member of his firm

from appearing for a particular party, in order that justice should not only be done, but be seen to be done. See: *Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd* [2010] 2 CLJ 1061.

[11] Whether there was conflict of interest depends very much on perception of the public, of the existence of such conflict, that would justify the disqualification of an advocate and solicitor from continuing to appear in the case, rather than existence of an actual conflict. An objective test has to be applied to the facts of the particular case to determine whether a case of appearance of conflict has been sufficiently made out to justify removal of an advocate and solicitor. See: *Perbadanan Pengurusan 3 TWO Square v. 3 TWO Square Sdn Bhd* [2017] 1 LNS 844.

Whether There Was Conflict Of Interest For Messrs GK Sritharan To Represent The Respondent

[12] The nub of the petitioner's contention in the present case was that there was a conflict of interest in the representation of the respondent by Messrs GK Sritharan, based on their involvement with the petitioner in the police matter involving the respondent, a matter which was the heart of the divorce petition. In support of this application, the petitioner relied on several rules of the Legal Profession (Practice and Etiquette) Rules 1978 ("Legal Profession (Practice and Etiquette) Rules"), namely rr. 3 and 28, which the petitioner claimed had been breached by Messrs GK Sritharan. Rule 3 of the Legal Profession (Practice and Etiquette) Rules reads:

> Rule 3 - Advocate and solicitor not to accept brief if embarrassed.
>
> (a) An advocate and solicitor **shall not accept a brief if he is or would be embarrassed**.
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> (b) An embarrassment arises:
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> (i) where the advocate and solicitor finds **he is in possession of confidential information** as a result of having previously advised another person in regard to the same matter;
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> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.
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> (emphasis added)

[13] Rule 3 of the Legal Profession (Practice and Etiquette) Rules has been expounded in several cases including *Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors* [2009] 4 CLJ 303, where the application of r. 3, which is based on the principle of confidentiality, was discussed - namely that there must be a relationship of solicitor-client or some other fiduciary relationship, and secondly, there must be disclosure of the relevant confidential information that was conveyed to the solicitor or fiduciary.

[14] I also drew guidance from the case of *Teoh Soo Beng v. Golden Castle City Sdn Bhd & Ors* [2018] 2 CLJ 631, whereby it was stated by Lim Chong Fong J (as he then was), in the following passage:

> No ground on which the court could properly intervene unless two conditions were satisfied: (i) that the solicitor was in possession of information which was confidential to the former client; (ii) that such information was or might be relevant to the mater on which he was instructed by the second client. This makes the possession of **relevant confidential information** the test of what is comprehended within the expression 'the same or a connected matter'. On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.
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> (emphasis added)

[15] The undisputed fact was that the petitioner had given all relevant confidential information to Messrs GK Sritharan regarding her arrest, and remand application, which was connected to the respondent's drug dealing. Messrs GK Sritharan had also advised the petitioner on the strategy, and what needed to be done, when she was arrested by the police.

[16] Mr GK Sritharan himself was also present at the police station in Johor, where the petitioner was detained, and when the remand application was dismissed by the Magistrate, it was Mr GK Sritharan who had met the petitioner.

[17] In the divorce petition from paras. 21 to 31, the petitioner had pleaded these circumstances as the basis for the irretrievable breakdown of the marriage, pursuant to s. 54(1)(b) of the Law Reform (Marriage & Divorce) Act 1976, which reads:

> Section 54 – Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
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> (b) that the **respondent has behaved in such a way** that the petitioner cannot reasonably be expected to live with the respondent;
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> (emphasis added)

[18] In my view, the conditions for the application of r. 3 of the Legal Profession (Practice and Etiquette) Rules had been fulfilled, in that the petitioner had established that there was a relationship of solicitor-client. The information that was acquired by Mr GK Sritharan, was now imputed to Messrs GK Sritharan, whether as a sole proprietorship or partnership, and the petitioner was relying on such information in the divorce petition against the respondent, whom Messrs GK Sritharan is now representing.

[19] Messrs GK Sritharan contended that although he had in fact represented the petitioner in the remand application, such application was fleeting and was only for a few minutes which did not warrant his recusal from representing the respondent in the divorce proceedings. In my view, this contention was bereft of merit. In my view, whether the representation was for 20 minutes or 20 days, the fact of the matter is that Messrs GK Sritharan did in fact represent the petitioner in the remand application which had now become the basis of the marital dispute in the divorce petition.

Whether Mr GK Sritharan Is A Potential Witness In The Divorce Proceedings

[20] To compound the matter, the petitioner had averred that the involvement of Mr GK Sritharan himself in the petitioner's arrest and remand, rendered him a potential witness in the divorce proceedings, as the petitioner claimed that Mr GK Sritharan would be in a position to testify to the circumstances leading to the petitioner's arrest, remand and her subsequent release by the learned Magistrate. This brought to the forefront r. 28 of the Legal Profession (Practice and Etiquette) Rules, which reads:

> Rule 28 - Advocate and solicitor not to appear in a case where he is a witness
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> (a) An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has **reason to believe that he will be a witness in respect of a material and disputed question of fact**, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.
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> (b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.
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> (c) These rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.
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> (emphasis added)

[21] The rationale for r. 28(a) was explained by Beaumont CJ in *Emperor v. Dadu Ramu*, AIR 1939 Bom 150, where His Lordship stated in the oft-quoted passage:

> *Generally, if an advocate is called as a witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by so doing he will embarrass the court or the client*. If a court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate, who has been called as a witness by the other side, and if, notwithstanding the court's expression of its opinion, the advocate refuses to withdraw, in my opinion in such a case the court has inherent jurisdiction to require the advocate to withdraw. *An advocate*

A *cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may well feel that justice will not be done if the advocate continues to appear*. But, in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence. (emphasis added)

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[22] Counsel for the respondent contended that the choice of advocate and solicitor was the prerogative of the litigant, in this case, the respondent. In my view, although a litigant is entitled to select the advocate and solicitor whom he desires to appear for him, this court is bound to see that the due administration of justice is not in any way embarrassed.

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[23] Reference was made also to *Quah Poh Keat & Ors v. Ranjit Singh Taram Singh* [2009] 4 CLJ 316, where it was explained that the first part of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules is where an advocate and solicitor (who is yet to appear in a case) who has reason to believe that he will be a witness in respect of a material and disputed question of fact, shall not appear in open court or even in chambers. In the second part of it, if he already has made an appearance in a case, and it becomes apparent that he will be a witness of a material and disputed question of fact, he shall not continue to appear, if he can retire without jeopardising his client's interests.

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E **[24]** In referring to several cases such as *Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors* [1996] 1 LNS 67; [1996] 4 MLJ 54, *Wee Choo Keong v. PP* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 and *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754, the bar against a solicitor appearing based on the likelihood that he would be a witness in the case was explained in *Quah Poh Keat & Ors v. Ranjit Singh Taram Singh*, by Suriyadi Halim Omar JCA in an enlightening passage:

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The highly pertinent question that must necessarily follow in its wake is, why the bar from appearing in such circumstances? The obvious answer, without the need for intensive judicial activism, is that in order to avoid any conflict of interest or embarrassing ethical issues, Parliament found the promulgation of this provision necessary. Imagine a situation where a solicitor might find himself in a sticky situation of being a potential witness in a legal tussle, by virtue of his previous professional duties. He is supposed to be at the forefront to plead justice fearlessly, when representing the cause of his client, yet with such an inhibition being present he might not do justice to his client. At first blush, this provision leaves it to the good sense of the solicitor to decide whether he will be called as a witness, in respect of a material and disputed question of fact and refrain from representing a client. *Despite that statement we are of the view that a judge pursuant to his inherent jurisdiction has the power to disqualify him if all the statutory preconditions have been complied with. Surely to avoid unnecessary problems prevention is better than cure in that, in such a scenario, an advocate and solicitor must be restrained at the outset*. (emphasis added)

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[25] Hence, at this stage, this court had to consider whether a reasonable man armed with all the facts, might reasonably anticipate the probability of Mr GK Sritharan himself being called as a witness at the hearing of the divorce petition. The petitioner submitted that she would be doing so, despite Mr GK Sritharan's indication that he would resist such subpoena if it was to be issued. At this stage, Mr GK Sritharan's objection to being called as a witness is irrelevant. The fact of the matter is he is a potential witness in the divorce proceedings, and as such, he should not be representing the respondent in the same.

[26] In breaching rr. 3 and 28(a) of the Legal Profession (Practice and Etiquette) Rules, Messrs GK Sritharan must also be reminded of rr. 4 and 5 of the Legal Profession (Practice and Etiquette) Rules, both of which read:

> Rule 4 - No advocate and solicitor to accept brief if professional conduct likely to be impugned.
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> No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that **his own professional conduct is likely to be impugned**.
>
> Rule 5 - No advocate and solicitor to accept brief if difficult to maintain professional independence.
>
> (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.
>
> (b) (i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal of other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.
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> (ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting. (emphasis added)

Whether Messrs GK Sritharan Had Breached Provisions Of The Legal Profession (Practice And Etiquette) Rules 1978

[27] The Legal Profession (Practice and Etiquette) Rules are a set of rules that govern the professional conduct of advocates and solicitors in their legal practice. The rationale for these rules is to ensure that lawyers uphold the integrity and dignity of the legal profession, maintain the highest standards of professional conduct and protect the interest of their clients and the public. The rules provide guidelines for the behaviour and actions of lawyers in various aspects of their practice, such as client communication, conflicts of interest, confidentiality, fees, and advertising. By adhering to these rules,

lawyers are expected to maintain the highest level of ethical behaviour, which in turn helps to maintain public trust in the legal profession. In a nutshell, these rules require advocates and solicitors to act with honesty, integrity and fairness in their dealings with clients, fellow advocates and solicitors, and the courts. They also provide for the enforcement of the rules through disciplinary procedures that may result in sanctions such as fines, suspension or disbarment.

[28] In fact, in *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing*, Abdul Malik Ishak J (as he then was), cautioned that to allow an advocate and solicitor or his legal assistants to appear in chambers or in open court when such advocate and solicitor may be a witness in the case, would be 'flying in the face of the clear words' of paras. (n) and (o) of s. 94(3) of the Legal Profession Act 1976 ("Legal Profession Act"), which read:

> Section 94 - Power of Disciplinary Board to strike off the Roll, suspend for misconduct etc
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> ...
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> (3) For the purposes of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:
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> ...
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> (n) **gross disregard** of his client's interests; and
>
> (o) being guilty of any conduct which is **unbefitting of an advocate and solicitor** or which brings or is calculated to bring the legal profession into disrepute. (emphasis added)

[29] His Lordship proceeded to advise that advocates and solicitors should have due regard to their client's interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute.

[30] In my view, Messrs GK Sritharan was treading very precariously in insisting on representing the respondent in the divorce petition, as they stand to run foul of several provisions of the Legal Profession (Practice and Etiquette) Rules as well as the Legal Profession Act.

Conclusion

[31] In the upshot, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, including written and oral submissions of parties, this application was allowed with costs.